filed a notice of intention to act in person in this action in place of Messrs Venu Nair & Co. The second defendant too filed a similar notice on the same day. Secondly, the second defendant, who was absent, is entitled to apply to set aside my order dismissing the appeal in his absence under O 14 r 11 of the Rules of the High Court 1980. The first defendant is entitled to appeal, as he is doing now, against my decision to the Supreme Court.

The question that arises here is whether the defendants are entitled to ask for further argument in open court under O 56 r 2(2), which states:

> Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit.

Under r 2(2) there must be an order made in chambers and the party dissatisfied with the order may apply for further argument. The word 'further' must be read in its plain and ordinary meaning. According to *The Shorter Oxford Dictionary* (3rd Ed) Vol 1, p 820, the word 'further' means, 'To or at a more advanced point ... (2) To a greater extent ... (3) In addition ...'. From the definition of the word 'further' it is clear that there must be an argument before the order is made in chambers, if the party seeks further argument. If the matter is adjourned into open court for further argument, the party who asks for further argument must present his argument in addition to what has already been argued in chambers. The party must either introduce additional issues or authorities or develop its argument to a more advanced point for the consideration of the judge. If there has been no argument at all in chambers, r 2(2) does not apply.

In the present case I made two orders, viz an order refusing to grant the adjournment and an order dismissing the appeal with costs. With regard to the first order, there was an argument but in this case further argument on the question of adjournment would not serve any purpose. In any event, in his letter to the senior assistant registrar dated 3 February 1990, the first defendant only asked for further argument in respect of the second order. There was no argument at all on the appeal on 30 January 1990. Since there was no argument, r 2(2) could not be invoked. In the circumstances I refused to allow the application for further argument and issued a certificate under the said rule that I did not require further argument. The second defendant did not make an application for further argument.

For the reasons stated above the orders I made in chambers stand until and unless reversed by the Supreme Court and in respect of the second defendant until and unless set aside by this court.

Application dismissed.

Solicitors: *Yusof Lee Pathma & Marbeck; Saran Singh & Co.*

Reported by *Azra Moiz*

Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D2-23-946-87
ZAKARIA YATIM J
31 JULY 1990

Civil Procedure — Appeal — Dismissal in default of appearance — Application to reinstate — Setting aside order — Rules of the High Court 1980, O 14 r 11

Civil Procedure — Extension of time — Further arguments — Affidavit giving reasons — Whether mistake of solicitor sufficient ground — Rules of the High Court 1980, O 3 & O 56

The plaintiff obtained summary judgment against all three defendants on 16 June 1988. On 21 June 1988 all defendants appealed to the judge-in-chambers. The first and third defendants failed to appear at the appeal either by their solicitors or in person, and both appeals were dismissed in default of appearance. The first and third defendants applied to have their appeals reinstated and the first and second defendants applied to enlarge time to apply for further arguments.

Held, dismissing the defendants' applications:

(1) The court will only allow reinstatement if the appeal was struck out. As both appeals were dismissed in default of appearance, the first and third defendants should have applied to set aside the dismissal. Order 14 r 11 of the Rules of the High Court 1980 applied to appeals. When the judge hears the appeal, he does so by way of rehearing. Alternatively, the defendants could have appealed against the whole of the decision of the judge-in-chambers.

(2) The court has a discretion whether or not to extend time. For the court to exercise its discretion, there must be an affidavit giving reasons why time should be enlarged.

(3) The mistake of the defendant's solicitors is not a sufficient reason to grant an extension of time. Neither was the first defendant's explanation that the third defendant was out of the country a sufficient reason to enlarge time.

[Bahasa Malaysia summary

Plaintif telah mendapat penghakiman terus terhadap kesemua defendan-defendan pada 16 Jun 1988. Pada 21 Jun 1988 defendan-defendan yang berkenaan membuat rayuan kepada hakim-dalam-kamar. Defendan pertama dan ketiga gagal untuk menghadiri rayuan itu samada secara bersendirian atau melalui peguam dan rayuan mereka ditolak kerana keingkaran

kehadiran. Defendan pertama dan ketiga kemudian memohon untuk menghidupkan semula rayuan mereka dan defendan pertama dan kedua memohon perlanjutan masa untuk membuat permohonan untuk hujah-hujah selanjutnya.

Diputuskan, menolak pemohoman-pemohoman itu:

(1) Mahkamah hanya boleh membenarkan penghidupan semula rayuan kalau rayuan itu telah dibatalkan. Oleh kerana rayuan itu telah ditolak kerana keingkaran kehadiran, defendan pertama dan ketiga seharusnya memohon untuk mengenepikan penolakan itu. Aturan 14 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980 terpakai kepada rayuan. Apabila hakim mendengar rayuan itu, ia membuatnya secara pembicaraan semula. Satu cara lain ialah untuk kedua-dua defendan membuat rayuan terhadap seluruh penghakiman hakim-dalam-kamar.

(2) Mahkamah mempunyai budibicara untuk melanjutkan masa dan untuk membolehkan ianya berbuat demikian, mesti ada afidavit memberi keterangan mengapa masa harus dilanjutkan.

(3) Kesalahan peguam defendan tidaklah menjadi satu sebab untuk melanjutkan masa dan penjelasan defendan pertama bahawa defendan ketiga berada diluar negeri juga tidak cukup sebagai alasan untuk melanjutkan masa.]

[*Editorial Note*: The defendants' appeal to the Supreme Court vide Civil Appeal No 02-68-90 was heard on 29 August 1990 and the Supreme Court (comprising Lee Hun Hoe CJ (Borneo), Mohamed Azmi and Jermuri Serjan SCJJ) dismissed the appeal.]

Cases referred to

1 *Gan Kiat & Bros Realty Sdn Bhd* v *Leong Ah Kan* [1983] 1 MLJ 351 (folld)
2 *Syarikat Pasir Perdana* v *Goh Pak Hoong Tractors & Building Construction* [1981] 1 MLJ 315 (folld)
3 *Goh Pak Hoong Tractors and Building Construction* v *Syarikat Pasir Perdana* [1982] 1 MLJ 77 (folld)
4 *Lee Lee Cheng* v *Seow Peng Kwang* [1958] MLJ 271 (folld)
5 *Seow Peng Kwang* v *Lee Lee Cheng* [1964] MLJ 1 (folld)
6 *Schafer* v *Blyth* [1920] 3 KB 140 (refd)
7 *Gatti* v *Shoosmith* [1939] 3 All ER 916 (refd)
8 *Palata Investments Ltd & Ors* v *Burt & Sinfield Ltd & Ors* [1984] 1 MLJ 118 (refd)
9 *Tractors Malaysia Bhd* v *Southern Eastern Sdn Bhd & Anor* [1984] 1 MLJ 118 (folld)
10 *Sri Jaya Transport Co Ltd* v *Fernandez* [1970] 1 MLJ 87 (folld)
11 *Gan Hay Chong* v *Siow Kian Yoh & Anor* [1975] 2 MLJ 129 (folld)
12 *Hoe Joe Sawmills* v *Sigma (Air Conditioning) Sdn Bhd* [1979] 2 MLJ 236 (folld)

Legislation referred to

Bankruptcy Act 1967, s 38
Companies Act 1965 ss 4, 125
Rules of the High Court 1980 O 3, O 14, O 35, O 50, O 56

Jean Chong Chiew Jin for the plaintiff.
Tony Dhana for the first and third defendants.

Cur Adv Vult

Zakaria Yatim J: There were two applications in this suit which came up for hearing before me in chambers.

In the first application the first and the third defendants sought the order of this court (a) that their notice of appeal to a judge-in-chambers dated 21 June 1988, which was struck out/dismissed, be reinstated; (b) a date be fixed for the hearing of the said appeal upon reinstatement; and (c) costs. The application was filed on 1 December 1989 and supported by an affidavit affirmed by the second defendant, Hah Siew Mung, on 1 December 1989.

In the second application, the first and second defendant sought the order of the court that time for applying for further argument in open court be enlarged to four days from the date of granting this application pursuant to O 56 r 2(2) of the Rules of the High Court 1980. The application was supported by an affidavit affirmed by the second defendant on 5 December 1989.

I shall briefly state the events that had taken place before dealing with the two applications.

On 6 August 1987, the plaintiff filed an application for summary judgment against the three defendants under O 14 r 1 of the Rules of the High Court 1980. The application was heard by the senior assistant registrar on 16 June 1988, and he made an order granting the defendants conditional leave to defend the plaintiff's suit subject to the defendants paying into court the claimed sum of $608,885.44 with interest. He also made an order that in the event of default of payment into court the plaintiff would be at liberty to enter final judgment for the said sum together with interest and costs.

On 21 June 1988, the three defendants filed their notice of appeal to the judge-in-chambers. The defendants were appealing against the decision of the senior assistant registrar who granted them conditional leave to defend the suit.

The appeal was set down for hearing on 13 October 1988. On that date the hearing was adjourned to another date, because counsel from the firm of solicitors Messrs Gurbakhash & Tan, who were acting for the defendants, was ill. The next hearing date was 15 March 1989. On that date Mr Gurbakhash informed me that the second defendant had been made a bankrupt in 1978 and he did not think that he could act for the second defendant. Both Mr Gurbakhash and Miss J Chong, counsel for the plaintiff, made brief submissions and then they said they needed more time to look up authorities. The hearing was adjourned to 25 May 1989 for continuation. On 25 May Miss Jean Chong said that she wished to amend the statement of claim and asked for an adjournment. Mr Gurbakhash did not object to the application for adjournment provided that he was paid costs. The hearing was adjourned to 20 November 1989 and I ordered the plaintiff to pay costs of $100 to the defendants.

On 20 November 1985 when the hearing resumed, Miss Jean Chong, counsel for the plaintiff, was present and the second defendant appeared in person. The first and third defendants were absent. Mr Raj who appeared on behalf of the Official Assignee was present at the request of the court. At the hearing, the second defendant told the court that he had just appointed a new counsel to represent him. His counsel phoned the plaintiff's counsel requesting for a postponement as he had to study the papers but the plaintiff's counsel did not agree to a postponement. At the hearing Miss Jean Chong confirmed that she did not agree to the postponement.

I refused to grant the adjournment and proceed to continue with the hearing of the appeals. The second defendant conducted his appeal in person. He was interrupted by Miss Jean Chong, who said that the second defendant had already been adjudicated a bankrupt. The second defendant confirmed that he had been adjudicated a bankrupt in 1978 and had not been discharged yet. At this stage Mr Raj confirmed that the plaintiff was entitled to file a suit against the second defendant but said that he needed time to study whether the second defendant could proceed with the hearing in this case. I then decided to adjourn the hearing of the appeal by the second defendant to another date. The appeal of the first and third defendants was dismissed with costs.

I refused to grant the adjournment for the following reasons.

The appeal had been pending from October 1988. On two occasions the hearing was adjourned at the instance of counsel for the defendants.

On 20 November 1989, the adjournment was requested by the second defendant. He had no authority to speak on behalf of the first and third defendants who were absent. In any event, counsel for the plaintiff objected to the adjournment.

I note that the firm of solicitors acting for the defendants in this case was Messrs Gurbakhash & Tan. According to a letter exhibited to the affidavit of Hah Siew Mung affirmed on 5 December 1989, Messrs Gurbakhash & Tan wrote to the second defendant in September 1989 stating that they had ceased to act for the defendants. The letter is reproduced below:

> Mr Steven Hah Siew Mung
> No 11 Jalan 14/34
> 46100 Petaling Jaya
> Selangor Darul Ehsan By Hand
>
> Dear Sir
>
> Re: Kuala Lumpur High Court CS No D2–23–946–87
> Asia Commercial Finance (M) Berhad v
> 1 Pasadena Properties Development Sdn Bhd
> 2 Hah Siew Mung
> 3 Aw Ngah Chee (f)
>
> With reference to the above we return herewith all the court documents.
>
> We confirm that no fee is due to us and that we have ceased acting for all the defendants as from 21 September 1989.
>
> Yours faithfully
> Sgd

According to the record of the proceeding before the senior assistant registrar dated 21 September 1989 in this suit, Mr Gurbakhash 'is discharging himself for all three defendants . . . '. In reply, 'second defendant agrees to the discharge on behalf of the other two defendants . . . '. The senior assistant registrar granted the discharge.

From the record of the proceeding before the senior assistant registrar, Mr Gurbakhash was not making an application to the senior assistant registrar to discharge himself from acting for the defendants. He was merely telling the senior assistant registrar that he was discharging himself. With respect the senior assistant registrar should not have made the order that Mr Gurbakhash was discharged.

Under O 64 r 5, a solicitor who wishes to discharge himself must apply to the court for an order declaring that he had ceased to be the solicitor acting for his clients. His application must be supported by an affidavit stating the grounds of the application. When the court makes the order, ' . . . unless and until the solicitor serves on every party to the cause or matter . . . a copy of the order, he shall . . . be considered the solicitor of the party till the final conclusion of the cause of matter . . . '.

I have examined the file in the present suit and I find that no such application or order had been made and there is no record to show that a copy of the order had been served on the defendants.

In my view Messrs Gurbakhash & Tan were still the solicitors for the defendants on 20 November 1989 when I dismissed the first and third defendants' appeal with costs. My view is supported by the documents in the court file. In November 1989 the solicitors for the plaintiff wrote three letters to Messrs Gurbakhash & Tan with regard to the same suit. (See encls 28, 29 and 30.) Messrs Gurbakhash & Tan only ceased to be solicitors for the defendants when Messrs Tony Dhana & Co filed a 'notice of change of solicitors' on 5 December 1989. The notice states that ' . . . Messrs Tony Dhana & Co . . . have been appointed to act as the solicitors of the . . . defendants in this action, in the place of Messrs Gurbakhash & Tan . . . '. This notice of change of solicitors was made pursuant to O 64 r 1.

Since Messrs Gurbakhash & Tan were still solicitors on record for the defendants on 20 November 1989, they did not offer any explanation why they were absent on that day. It is not clear which firm of solicitors was asking the solicitor for the plaintiff to adjourn the hearing to another date. In any event the solicitor on record was absent on that day and both the first and third defendants were also absent. The second defendant filed an affidavit affirmed on 1 December 1989 in support of the first application. This is the only affidavit filed in support of the first application. This affidavit is inadmissible insofar as his averment with regard to the first defendant. I shall give my reasons as to why the affidavit pertaining to the first defendant is inadmissible when I deal with the second application below. His explanation as to why his wife was absent is inadmissible but inadequate.

In the circumstances, I disallowed the application for adjournment and dismissed the first and third defendants' appeal with costs in default of appearance of the first and third defendants.

Having stated the events that led to the order dismissing the first and third defendants' appeal with costs, I shall now deal with the first application, viz to reinstate the notice of appeal. From the application it seems that the second and third defendants were not sure whether their appeal was struck out or dismissed. In any case what they were asking was reinstatement. In my opinion the court will only allow reinstatement if the appeal was struck out. In *Gan Kiat & Bros Realty Sdn Bhd* v *Leong Ah Kan*,[1] the defendants' solicitor and his clients were present while the plaintiff's solicitors and his client were absent. The magistrate ordered that the action by the plaintiff be struck off. The solicitors for the plaintiff applied to the magistrate for the reinstatement of the case. The magistrate allowed the application. The defendant appealed against the order of reinstatement. The learned judge dismissed the appeal. I agree with the decision of the learned judge in the *Gan Kiat* case.[1]

In the instant case the first and third defendants should have applied to set aside the order dated 20 November 1989 under O 14 r 11. Rule 11 states: 'Any judgment given against a party who does not appear at the hearing of an application under Rule 1 or Rule 5 may be set aside or varied by the Court on such terms as it thinks just.' Order 14 r 11 is quite similar to O 35 r 2(1). In *Syarikat Pasir Perdana* v *Goh Pak Hoong Tractors & Building Construction*,[2] the defendants and their solicitors were absent at the trial. The solicitors for the defendants had earlier asked for adjournment. The learned judge refused to grant the adjournment and entered judgment in default against the defendants. In his judgment, he said:

> In this case if there is an application to set aside my order, I would have to enquire the real nature of the defendant's sickness and if he was such that he could not travel, I would allow the application.

The decision of the learned judge was confirmed by the Federal Court.[3] Hashim Yeop A Sani J (as he then was) in delivering the judgment of the Federal Court said:

> Here the learned judge has also stated that although he had entered judgment in default it would still be open for the appellant to apply to the court to set aside the order upon giving valid reasons. Unfortunately no such application was ever made to the learned judge.

In that case the defendants appealed against the decision of the learned judge instead of making an application to set aside the order.

Although the present case is an appeal against the decision of the senior assistant registrar, in my opinion r 11 applies to the present case. This is because when the judge hears the appeal, he does so by way of rehearing. The judge treats the matter as if it has come up for hearing for the first time. Alternatively, the defendants could have appealed against the whole of my decision dated 20 November 1987 as was done in the *Syarikat Pasir* case[2] but they decided not to do that. It is too late now for them to file their appeal.

For the reasons I have just stated I dismissed the application with costs.

I now turn to the second application, namely, for extension of time to apply for further argument in open court under O 56 r 2(2). Rule 2(2) states:

> Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit.

The order dismissing the first and third defendants' appeal was made in chambers on 20 November 1989. The second application was filed on 5 December 1989, that is 15 days later.

The affidavit in support of the application, which was affirmed by the second defendant, averred that in September 1989, his former solicitors Messrs Gurbakhash & Tan had discharged themselves from the case. The second defendant tried to get another solicitor to take over the case for the hearing in chambers on 20 November 1989 but he was not able to get a new solicitor in time. He was only able to see Mr Tony Dhana on 25 November 1989. Consequently, an application for reinstatement was prepared and filed on 1 November 1989. He then referred to the application

for enlargement of time to apply for further argument. He said that the third defendant, his wife, was absent on 20 November 1989 because she had been in Australia with their children for one and a half years. The rest of the affidavit dealt with the merits of the appeal.

The first thing to note here is that the deponent of the affidavit, the second defendant, states in para 1 that he is 'the manager and principal officer' of the first defendant. In para 12(a) of the same affidavit, he states, 'The reality of the situation is that I am the principal officer managing the affairs of the first defendant company . . . '. Under s 4 of the Companies Act 1965, a manager in relation to a company, means the principal executive officer of the company for the time being by whatever name called and whether or not he is a director. The same section defines 'officer' in relation to a corporation to include any director, secretary or employee of the corporation. Although a manager is not a director of the company, he may for some external purposes be regarded as more than a mere agent or servant.

From the affidavit of the second defendant and from the definitions of the words 'manager' and 'officer' in s 4 of the Companies Act 1965, it is clear that the second defendant was the principal executive officer of the company. It will be recalled that the second defendant confirmed that he had been adjudicated a bankrupt in 1978 and had not been discharged yet. As he was not a director of the company he was not disqualified to hold office under s 38 of the Bankruptcy Act 1967. But he admitted in his affidavit that he was 'the principal officer managing the affairs of the first defendant company'. When he acted in that capacity he was directly or indirectly taking part in or was concerned in the management of the company. In my view the second defendant had acted in contravention of s 125(1) of the Companies Act 1965. He had so acted without the leave of the court. Section 125(1) states:

> Every person who being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any corporation except with the leave of the Court shall be guilty of an offence against this Act.

Since the second defendant had acted in contravention of s 125(1) in my view he had no capacity to affirm the affidavit on behalf of the first defendant or alternatively his averment pertaining to the first defendant is inadmissible and cannot be relied upon. His averment in the affidavit with regard to the third defendant, who is his wife, is however, admissible.

At the hearing of the application I was not shown any direct authority on the question of enlargement of time to apply for further argument under O 50 r 2(2). My Tony Dhana referred to O 3 r 5(1) and (2) of the Rules of the High Court 1980. Rule 5(1) and (2) states:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of the period.

In my view it is left to the discretion of the court whether or not to extend the time under the above rule. The discretion to be exercised by the court is a judicial discretion. See The Supreme Court Practice 1985 Vol 1, p 15; and Mallal's Supreme Court Practice (2nd Ed) Vol 1, p 14. For the court to exercise its discretion whether or not to enlarge the time, there must be an affidavit to give reasons or to explain why the court should make an order to enlarge the time. I shall deal with the question of affidavit shortly.

Mr Tony Dhana next referred to item 8 of the Schedule to the Courts of Judicature Act 1964. Item 8 states:

> Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed.
>
> Provided that this provision shall be without prejudice to any written law relating to limitation.

With respect, item 8 is merely declaratory of the jurisdiction of the High Court to enlarge the time prescribed by any written law. In *Lee Lee Cheng* v *Seow Peng Kwang*,[4] Syed Sheh Barakbah J, as he then was, said at p 272:

> In reply, Mr Huntsman, for the defendant, submitted that item 12 was merely declaratory. It declared the court's power to extend the time where there was express provision in the law to do it. With this view, I am inclined to agree. This item 12 in my opinion, merely sets out the jurisdiction of the High Court, namely, the scope of the authority to deal with certain matters expressly provided for by the law, and the court could enlarge the time only where there was express provision in the law to that effect, as, for instance, among others, the Land Acquisition Act (Cap 140), s 22(3) and (4) and s 5(1) of the Japanese Judgments and Civil Proceedings Ordinance 1946, where the law specially provides the power of enlargement by the court. In my view, item 12 does not give general power of enlargement to the court.

Syed Sheh Barakbah J's decision was affirmed by the Court of Appeal.[5]

Mr Tony Dhana next referred to three English cases. In the first case, *Schafer* v *Blyth*,[6] the court exercised its discretion to enlarge the time to enable the defendant to make an application to set aside judgment in default of appearance. Lush J was satisfied with the explanation given by the application in that case. At p 144, the learned judge said:

> In the circumstances I think that the application of the defendant should be granted. He has explained that he searched the cause lists for the action and was misled as to the day of the trial. He made an excusable mistake, and he ought not to suffer unnecessarily for it. I order that the action be restored to the list, and I will try it myself. The defendant however must pay the costs thrown away.

Mr Tony Dhana next referred to *Gatti* v *Shoosmith*.[7] In that case the applicant was applying for extension of time to enter his appeal. The applicant was a few days late in entering his appeal and the reason for the delay as explained in an affidavit, was the mistake of the solicitors. The English Court of Appeal allowed the extension of time and leave to appeal was given. The third case relied upon by Mr Tony Dhana was *Palata Investments Ltd & Ors* v *Burt & Sinfield Ltd & Ors*.[8] The headnote of that case reads as follows:

> When considering an application under RSC O 59 r 14(12) for an extension of time for appealing beyond the time limit specified in O 59 r 4(1) of four weeks from the date on which the judgment or order of the court below was signed, entered or otherwise perfected, the discretion of the Court of Appeal is unfettered and will be exercised and there is an acceptable excuse for it, the court will not as a general rule deprive the appellant of his right of appeal, and in such a case it will not be necessary for the court to consider the merits of the appeal.

It will be noted that in the *Gatti* case[7] and *Palata* case,[8] although the delay was due to the mistake of the solicitor the Court of Appeal allowed the extension of time.

The Federal Court, however, has taken a different stand. In *Tractors Malaysia Bhd* v *Southern Estates Sdn Bhd & Anor*,[9] Mohamed Azmi FJ, as he then was, in delivering the judgment of the Federal Court said at p 121:

> In the Federal Court we rule that mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal.

See *Sri Jaya Transport Co Ltd* v *Fernandez*.[10] In *Gan Hay Chong* v *Siow Kian Yuh & Anor*,[11] the Federal Court held that the mistake of the appellant's solicitors in that case did not constitute a sufficient ground for granting the extension of time. In *Hoe Joe Sawmills* v *Sigma (Air Conditioning) Sdn Bhd*,[12] the reason given for the application for extension of time, was the fault of the solicitor's clerk. The Federal Court decided that this was insufficient ground for the granting of special leave.

Although *Tractors Malaysia* v *Southern Estates*,[9] *Sri Jaya Transport* v *Fernandez*,[10] and *Gan Hay Chong* v *Siow Kian Yuh*[11] were concerned with applications for extension of time to file notice of appeal to the Federal Court, in my view the principles laid down in those cases apply to the present case. There are two points to be noted in the Federal Court decisions. Firstly, the mistake of the appellant's solicitors or the solicitor's clerk is not sufficient ground to grant an extension of time. Secondly, in all those three cases affidavits were filed in support of the application for extension of time and the Federal Court took into consideration the affidavits filed in arriving at its decision. Even in the *Gatti* case[7] and *Palata* case,[8] the English Court of Appeal relied on the explanation contained in the applicants' affidavits before making its decision.

In the present case, when I dismissed the appeal by the first and third defendant on 20 November 1989, there was a solicitor on record but he was absent. He had not filed any affidavit to explain or to give reasons why he was absent. As stated earlier the second defendant's averment for and on behalf of the first defendant in his affidavit is inadmissible. The explanation in the affidavit on the absence of the third defendant is not sufficient ground to grant the extension of time.

In the absence of an affidavit giving sufficient grounds to justify an extension of time to enable the first and third defendants to apply for further argument, the second application was dismissed with costs.

Application dismissed.

Solicitors: *Tony Dhana & Co; Soo Thien Ming & Shahrizat.*

Reported by *Mathavan Devadas*

Kin Moh Sdn Bhd v Mahashukor Palmoil Industries Sdn Bhd

HIGH COURT (JOHORE BAHRU) — COMPANIES WINDING-UP NO 42-20 OF 1985
ABU MANSOR J
31 JANUARY 1990

Companies and Corporations — Winding-up — Payment of petitioner's taxed cost — Payment to be made out of company's assets — Payment to be made by liquidators under previous court order — Receiver and manager not liable — Companies Act 1965, s 292

The petitioner applied by notice of motion on 14 December 1988 for an order that the taxed costs of the winding-up petition against the respondent be paid by the respondent's liquidator or receiver and manager out of the proceeds of the sale of the respondent's assets. The petitioner contended that since the respondent's assets were taken by the receiver and manager and the liquidator was left with nothing, the taxed costs should be paid by the former who had opposed the winding-up petition but were unsuccessful. The petitioner further argued that the taxed costs had to come from the respondent's assets which, within the meaning of s 267 of the UK Companies Act, included property which were subject to a floating charge prior to the winding-up. Such assets would form part of the assets of the respondent which were applicable first, in the payment of costs and expenses of the winding-up.